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ORIGINAL

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

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**DOCKET NO. 15-11**

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**IGOR OVCHINNIKOV, ET Al**

**v.**

**MICHAEL HITRINOV ET AL**

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FILED

MAY 4 - 2016

Federal Maritime Commission
Office of the Secretary

**RESPONSE OF RESPONDENTS TO ORDER TO SHOW CAUSE**

Pursuant to the Presiding Officer's Order of April 13, 2015 as amended by the Order of April 27, Specially-Appearing Respondents Empire United Lines and Michael Hitrinov ("Respondents") hereby respond to the March 30, 2016 Order to Show Cause. As also required, Respondents' Answer is being filed concurrently herewith. The filing by Specially-Appearing Respondents of the Response and Answer is done under a reservation of their right to challenge personal jurisdiction/service, and is not intended and should not be construed to suggest that Specially-Appearing Respondents have subjected themselves to the personal jurisdiction of the FMC in this matter

We show herein that a default judgment should not be entered for four independent reasons (1) Such a judgment would be inconsistent with precedent declaring default to be a drastic remedy of last resort that should be used only when the matter cannot be litigated on the merits, (2) The Commission lacks personal jurisdiction over Respondents, (3) The Complaint fails to raise a claim upon which relief could be granted, and (4) The Commission lacks subject matter jurisdiction over the dispute.

## INTRODUCTION

The factual background to this proceeding has been briefly described in Respondents' Motion to Stay Rather than repeat all that here, we provide only the barest statement of essential facts, and procedural history To avoid unnecessary duplication, we use here the same shortened references used in prior submissions.

1 **Facts**.

Complainants herein are residents of Russia or the former Soviet Union who allegedly purchased automobiles from members of the Kapustin Global Auto Group, to be delivered to Complainants by the Group at the Group's facility in Finland (Global Cargo Oy) [1] Pursuant to an ongoing understanding between the Group and Empire (see below), the Group contracted with Empire to fulfill the Group's transatlantic delivery obligation. The practice was that a member of the Group would deliver cars (usually in small groups) to EUL, followed some time later by delivery of the title, always made out in the name of a Group member EUL would put the cars into containers, sometimes with cars from persons other than the Group Once the title arrived, EUL would deliver the container(s) to an ocean common carrier, usually MSC, for delivery to Finland. MSC would there release the containers to a company known as CarCont, which would take the cars and other cargo out of the containers.

The Group would determine from MSC's website when the container with the car(s) of interest had arrived. Then, if the Group wished release of a particular vehicle, it would request release from EUL, (based on repayment of the requisite loan funds or provision of substitute collateral in the form of another car) Once the requirements were met, EUL would send the

[1] We note that the District Court in New Jersey has found Global Cargo Oy, as well as the other members of the Group, to be alter egos of Mr Kapustin and equally at fault for violations of RICO, consumer fraud statutes, etc.

release to CarCont, allowing it to release the specific car to Global Cargo Oy, and only to Global Cargo Oy, as specified in the release instructions from the Kapustin Global Auto Group A driver from Global Cargo Oy, in these four cases Igor Zadorozny,[2] would come to CarCont, and on presentation of identification take custody of the vehicle. EUL had nothing to do with the cars after they were released to Global Cargo Oy

As the foregoing illustrates, Empire had no dealings with the Group's customers during any part of the transportation. It was the Group that entered into the transportation arrangements with Empire, not the Group's individual customers, and the titles Empire received from the Group did not identify the customer In most cases over the years, Empire never had reason to learn the names of the Group's customers, and in fact learned Complainants' identities only well after the cars were liquidated in Finland.

As also described before, Empire had a financial relationship with The Kapustin Global Auto Group, providing the Group with funds to purchase the vehicles, which then served as collateral. Under that arrangement, Empire would release a car to the Kapustin Global Auto Group only after the Group either re-paid the funds by the requisite amount or provided substitute collateral in the form of another vehicle. Unfortunately, the Kapustin Global Auto Group ceased either to repay the funds or to provide new collateral, and refused Empire's demand to repay the funds as required by the parties' agreement. When it became clear that the Group had no intention of repaying the funds, Empire liquidated the collateral, including three of the cars claimed by Complainants.[3]

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[2] Yet another person found by the New Jersey Judge to be a part of the global RICO enterprise.

[3] One of the cars, that claimed by Ms. Rzaeva, remained at CarCont until sometime in 2015, when it was liquidated by CarCont to cover accumulated storage fees.

The default by the Kapustin Global Automotive Group and subsequent exercise by Empire of its contractual rights regarding the collateral led, as previously described, to what the New Jersey Judge has referred to as a "labyrinthine" set of interlocking litigations. To put it as briefly as possible, the Group and Empire sued one another in the Eastern District of New York. A group of customers not including Complainants herein sought to intervene in the EDNY action. When turned away, they filed an action in the District of New Jersey against the Kapustin Global Auto Group, where they were eventually, after a fake bankruptcy or two, awarded a judgment of roughly $2.3 million. When they could not collect against the Group's hidden assets, they accepted instead an assignment of the Group's purported claims against Empire for 60 cars, including those complained about here, which was implemented by an amended cross-claim in the New Jersey action.

**2. Brief Procedural History**

Complainants filed the instant Complaint on November 12, 2015 As addressed below, the Complaint either was or was not properly served on Empire (we say not). It appears, although not in the electronic docket, that Complainants by email filed a letter motion for notice of default on December 29, 2015, which letter motion was struck by the Presiding Officer as improper on December 30 Some two and a half months later, on February 14, 2016, the Complainants filed a properly-formatted motion for default, which counsel for Complainants allegedly sent to Empire by first-class mail, but which was never received by Empire. On March 20, 2016, the Presiding Officer issued the Notice of Default and Order to Show Cause to which this paper responds (as extended by the Presiding Officer's Orders of April 13, and 27, 2016)

## ARGUMENT

### 1 Entry Of A Default Judgment Would Contradict FMC Standards

Both the FMC and the Courts treat default as a matter of last resort, to be utilized only when there is no way to adjudicate the matter on the merits. As Judge Wirth has explained.

> "A party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default. *Lewis v Lynn*, 236 F.3d 766, 767 (5th Cir 2001). Default judgements [sic] are not favored and should be reserved for extreme situations. *Willis v Freeman*, 83 Fed. Appx. 803, 805 (7th Cir 2003) Because 'defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party ' *Enron Oil Corp v Diakura*, 10 F.3d 90, 96 (2nd Cir 1993) ***Dismissal by default is not favored where the case can be addressed on the merits"*** *Barbara v Africa Shipping*, 32 SRR 743, 747 (Init. Dec., Admin Final 2012) (emphasis added).

Judge Wirth's observations are consistent with long-running Commission precedent. See, e.g., *Tak Consulting Engineers v Bustani*, 28 SRR 581 583 (ALJ 1998) ("The reluctance to decide cases by default judgment is consistent with the underlying philosophy regarding proceedings before administrative agencies like the Commission. Under this philosophy agencies prefer to decide cases based on evidence rather than on defaults and technicalities."), *CTM International, Inc. v Medtech Enterprises, Inc.*, 28 SRR 1320, 1323 (ALJ 2000) ("courts are reluctant to impose such extreme sanctions absent egregious or continued showing that a party deserves such a sanction").

Furthermore, it must be remembered that during the period prior to the Order to Show Cause, Empire was not represented by counsel in this matter, and the FMC has always accorded the benefit of any doubt to *pro se* litigants. As Judge Wirth identified in *Barbara,* above:

> "'[C]oncerns regarding the protection of a litigant's rights are heightened when the party held in default appears *pro se.*' *Enron Oil Corp v Diakuhara*, 10 F.3d at 96 The Commission, like other administrative bodies, has treated *pro se*

litigants with special leniency Bernard & Weldcraft Welding Equipment v Supertrans Int'l, Inc., 29 SRR 1340, 1341-1342 (ALJ 2002)."

Grant of a default judgment against Empire is simply unwarranted under these standards. Most important, this matter ***can*** be litigated on the merits if the Presiding Officer rules in favor of Complainants on the propriety of service and on the forthcoming motion to dismiss. Empire has, in accordance with the Order to Show Cause and April 13 Order extending time, filed its answer simultaneously herewith. And although Empire and its counsel have thus far entered only special appearances, should the Presiding Officer rule that the Commission has personal jurisdiction and that the Complaint should not be dismissed as will be asserted in Respondents' Motion to Dismiss, Respondents are prepared to appear generally and move forward. Counsel for Respondents is aware of no proceeding before the FMC where a default judgment was entered for failure to timely answer where the respondent filed an answer in response to an Order to Show Cause.

Even apart from this decisive consideration, entry of a default judgment would not be appropriate under the FMC's standards. This is simply not one of those "extreme" or "rare" circumstances where such drastic action is necessary There is no appreciable harm to Complainants from the brief delay in filing an answer, especially when measured by the two and a half months Complainants waited to file a formal motion for default after their letter motion was rejected. Moreover, as discussed immediately below, Empire had at least a reasonable basis to conclude that it was not required to answer due to defective service, especially as it was at that time acting pro se with respect to this proceeding.

**2. <u>The Commission Lacks Personal Jurisdiction Over Empire</u>**

It is axiomatic that a tribunal may not enter a default judgment unless it has personal jurisdiction over the respondent. As the court explained in *D'Onofrio v Il Mattino*, 430 F

Supp.2d 431, 437 (E.D Pa. 2006), entry of a default judgment without personal jurisdiction violates Due Process, and further:

> "[A]s a threshold matter [in considering a motion for default], the court must satisfy itself that it has personal jurisdiction over the party against whom default judgment is requested. A default judgment entered without personal jurisdiction is void. ['W]hen entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the district court has an affirmative duty to look into its jurisdiction over the subject matter and the parties.'" (Citations omitted) (Additional cases will be cited in Empire's Motion to Dismiss)

Moreover, it is Complainants' burden to prove such jurisdiction. See, e.g., *Robinson v Overseas Military Sales Corp* , 21 F.3d 502, 507 (2nd Cir 1994) (plaintiff must prove court had personal jurisdiction over defendant) (Additional cases will be cited in Empire's Motion to Dismiss)

As demonstrated at length in Empire's forthcoming Motion to Dismiss, and outlined below, Complainants have failed to carry that burden.

- "A court cannot obtain personal jurisdiction over a party without ***proper*** service of process." Moreover, "[w]ithout ***proper*** service of process, any default judgment entered by the court is void for lack of personal jurisdiction." *D'Onofrio*, supra, 430 F Supp.2d at 438 (emphasis added). (Additional cases will be cited in Empire's Motion to Dismiss)
- While "notice" is an essential element of service, it is not by itself sufficient to subject a party to the personal jurisdiction of the FMC "Although notice underpins Federal Rule of Civil Procedure 4 concerning service, ***notice by itself cannot by itself validate an otherwise defective service.*** Proper service is still a prerequisite to personal jurisdiction." *Grand Entertainment Group v Star Media Sales, Inc.*, 988 F.2d 476, 492

(3rd Cir 1993). See, e.g., *Echevarria-Gonzalez v Gonzalez-Chapel*, 849 F.2d 24, 28 (1st Cir 1988) (a court's power to assert *in personam* authority over parties defendant is dependent not only on compliance with due process, but also on compliance with the technicalities"), *Dunlap v City of Fort Worth*, No 4 13-cv-802-O; 2014 U S. Dist. LEXIS 59577 at *8 (N.D Tex. 2014) ("[T]hat the defendant may have received notice is insufficient for service of process") (Additional cases will be cited in Empire's Motion to Dismiss)

- The express terms of FMC Rule 113 make clear that returned mailings are not considered to be "served," but merely result in the Commission informing Complainants that they must attempt service themselves. "If the complaint cannot be delivered, for example if the complaint is returned as undeliverable or not accepted for delivery, the Secretary will notify the Complainant." The undersigned understands from prior communications with the Office of the Secretary that this is their understanding as well. Accordingly, the copies of the Complaint mailed by the Office of the Secretary may not be considered as served.[4]
- Complainants' attempts at service were equally unavailing. As will be shown in greater detail Empire's forthcoming Motion to Dismiss (and affidavits attached thereto)

[4] We understand that the FMC's mailing in Docket No 1953 (I) was not returned. As shown in Attachment 1, it was recently discovered that the papers were misdelivered to a neighboring company, where they sat unopened.

(1) Complainants' purported service of Mr Hitrinov by leaving a copy of the Complaint with a receptionist at a law firm with which Mr Hitrinov does business, is ineffective. Even a respondent's attorney, much less the attorney's receptionist, is not a person on whom service may be made unless he or she is specifically authorized to accept service on behalf of respondent. See, e.g., *Moore v McCalla Raymer, LLC*, 916 F Supp 2d 1332, 1340 (N.D Ga. 2013) ("Service upon counsel is ineffectual, unless the party has appointed his attorney his agent for process"), *Durbin Paper Stock Co v Hussain*, 97 F.R.D 639, 639 (S.D Fla. 1982) (similar); *Grand Empire* Group, supra (service on receptionist insufficient); *Pickering v Arcos Dorados Puerto Rico Inc.*, Civ No 2014-92, 2016 WL 1271024 (D V.I., filed March 30, 2016).

(2) Complainant's purported service of EUL is equally defective because the affidavit of service, apart from being filed well after the date required by the FMC rules, describes nobody, even vaguely, who works at EUL (and certainly nobody authorized to accept service on behalf of EUL) Service on a "Jane Doe" is simply not sufficient without evidence that she occupied a position of sufficient authority *Pickering v Arcos Dorados Puerto Rico Inc.*, Civ No 2014-92, 2016 WL 1271024 (D V.I., filed March 30, 2016), *Granger v American E-Title Corp* , Civil Action No 10-4627(JLL), 2013 WL 1845338 (D NJ, filed April 10, 2013) Moreover, as will be addressed more fully in Respondents' Motion to Dismiss and

accompanying affidavits, a check of all EUL employees found that nobody had received any such service.

- As will be established by Respondents' Motion to Dismiss and attached affidavits, neither Mr Hitrinov nor EUL has ever sought to evade service in this matter Furthermore, Mr Hitrinov has never instructed EUL's employees to reject mailings from the FMC Any confusion is likely the result of EUL being a rather small, informal office, and Mr Hitrinov having been almost entirely out of the office during this period. Mr Hitrinov previously accepted service in the *Baltic* proceeding as well as in multiple federal litigations regarding the various cars.

Because there has been no proper service of process, "the appropriate procedure is to dismiss [Complainants' case] *sua sponte* for lack of personal jurisdiction." D'Onofrio, supra, 430 F Supp.2d at 438 [5]

Finally, even should the Presiding Officer conclude that service was properly effectuated on EUL and/or Mr Hitrinov, it is clear that, at the very least, Respondents had a reasonable basis for believing that they were not properly served and therefore not obligated to appear Given the Commission's policy of resolving all doubts in favor of parties against whom default is sought, entry of a default judgment would clearly be unwarranted and inappropriate, especially as Respondents were without counsel in the proceeding at that time.

[5] As the Presiding Officer may elect to allow Complainants extra time to perfect service, Respondents would be willing to waive the defects if the Presiding Officer decides not to enter a default judgment.

### 3. Complainants Fail To State a Claim For Reparations.

Before issuing a default judgment, the Presiding Officer is expected to reach a conclusion that Complainants have by their allegations (1) made out an actual violation of the Shipping Act,. and (2) shown that they have suffered damages in an amount certain as the proximate result of those violations. See, e.g., *Bimsha International v Chief Cargo Services, Inc.*, 32 F Supp 353 (I.D 2011), adopted 32 SRR 1861 (FMC 2013), *Century Metal Recycling PVT, Ltd. V Dacon Logistics, LLC,* 32 SRR 1763 (I.D ), adopted, 33 SRR 17 (FMC 2013). For this purpose, the Presiding Officer is to accept Complainants' well-pleaded allegations of fact, but not their legal conclusions. Even accepting Complainants well-pleaded allegations as true, they have shown neither a violation of the Shipping Act nor any damages proximately related thereto These conclusions cannot be reached in this matter

Complainants have alleged purported violations of eight separate sections of the Shipping Act (assuming that the second reference to 46 U S C. 41104(10) was intended to be 46 U S C 41104(11)). As we now show, none makes out a claim for which relief may be granted.

1. **46 U.S.C. 40701(a).** Section 40701(a) is in a chapter entitled "Controlled Carriers," and begins as follows. "A controlled carrier may not— " A "controlled carrier is specifically defined by the Act, in pertinent part, as follows "The term 'controlled carrier" means an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by a government " 46 U S C 40102(8) EUL and Mr Hitrinov are patently not "controlled carriers," as they are not "ocean common carriers" (a vessel-operating common carrier) and are not owned/controlled by a government. Because Respondents are not and are not alleged to be, controlled carriers, the claim for violation must be

dismissed, even apart from the fact that Complainants have proffered no plausible causal connections between below-market rates and their alleged harm.

2. **46 U.S.C. 41102(c).** It is difficult to understand exactly what Complainants are asserting, even though they recite the provision in two different claiming paragraphs. In any event, none of it conceivably amounts to a Shipping Act violation. The gist of the allegations appears to be that EUL (i) refused to release the cars to them, and (ii) declined to give them certain shipping documents. As an initial matter, their factual allegations regarding this purported violation do not say that ***EUL*** declined to release the cars or provide the documents. Rather, the factual allegations are all addressed to CarCont, which is no longer a party to this dispute. More importantly, the Complaint fails to assert any basis in law or reason why EUL (or CarCont) was obligated to release the vehicles or provide the requested shipping documents to Complainants.

As previously explained in the Facts, and elaborated in the very next section, Complainants were entirely strangers to the transportation. They did not pay the freight to Respondents, they did not arrange with Respondents for the transportation, and Respondents took no responsibility to provide transportation to them. Indeed, Respondents had no idea who Complainants were until well after the vehicles were sold. And while the Complaint is artfully worded so as not to admit outright that Complainants were strangers to the transaction, it never says that they had any business relationship with EUL.

EUL's transportation arrangement was solely with the Kapustin Global Auto Group, and only the Group had the right to request release or demand any

shipping documents. Complainants were customers of the Kapustin Global Auto Group, not EUL. They simply purchased a consumer good from a company in the U S for delivery elsewhere, just as they might do from a major retailer such as Target or Wal-Mart. They had absolutely no right to demand release of the cars or documents from EUL. Only the Group had authority to request release (on specific terms and conditions), and it never made any such request. Indeed, as the Presiding Officer has made clear, EUL would have violated 46 U S C 41102(c) had it released the cars without a request from Group *Bimsha, Int'l*, supra. Likewise, because the transportation arrangements were solely between EUL and the Group, EUL not only lacked any authority to provide the mentioned documents to Complainants, it would have violated 46 U S C. 41103 had it done so without the Group's consent.

3. **46 U.S.C. 41104(2).** Complainants allege that EUL failed to provide service in the liner trade that was in accordance with a published tariff. Complainants do not allege that EUL operated in a liner trade, or that the service it provided to the Group was provided under a tariff, as opposed to a service contract or exempt rate. More importantly, as with the controlled carrier claim, there is absolutely no nexus between the alleged violation of an improper rate and the harm asserted – loss of the price complainants paid for the car

4. **46 U.S.C. 41104(3).** Section 41104(3) forbids a carrier to "retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has

filed a complaint, or for any other reason." Even apart from the fact that Complainants were not, and do not allege themselves to be "shippers," the Complaint is plainly deficient. As the Presiding Officer has identified, the *sine qua non* of any claim under this provision is an allegation of actual retaliation due to the shipper having patronized another carrier *Edaf Antilles, Inc. v Crowley Caribbean Logistics LLC*, 33 SRR 710 (ALJ, Admin Final 2014) The Presiding Officer there explained that "As CCL states, the Commission has held that Section 10(b)(3) [now section 41104(3)] 'applies solely to retaliatory acts of a carrier against a shipper who has sought the services of another carrier'" (quoting in part from *California Shipping Lines, Inc. v Yangming Marine Transport Corp* , 25 SRR 1213, 1225 (FMC 1990) Complainants have not alleged any facts suggesting retaliation, much less for patronizing another shipper

**5.** **46 U.S.C. 41104(3), (4), (8) & (9).** Respondents have grouped these together as they all share an essential element of discrimination – that is, treating one party better than another (normally required to be a competitor As the Commission has explained, a complainant claiming discrimination must establish for matters. (1) two parties are similarly situated or in a competitive relationship; (2) the parties were accorded different treatment; (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the alleged injury *Ceres Marine Terminal, Inc. v Maryland Port Administration*, 27 SRR 1251, 1270-71 (FMC 1997) See *Edaf Antilles*, supra.

The Complaint does not assert or allege facts supporting any of these requirements. Complainants has not identified any other party in similar circumstances that received better treatment, much less that any such difference was not justified by transportation factors, nor has it explained how any such difference was the proximate cause of their claimed injury

6. **46 U.S.C. 41104(10).** Complainants assert (twice in the same paragraph) that EUL unreasonably refused to deal or negotiate, but do not identify "what" EUL declined to negotiate or what obligation EUL may have had to negotiate that unspecified "what." Nor do they allege how any refusal to negotiate resulted in the alleged injury All they do is paraphrase the statutory language. And as noted above, legal conclusions do not receive any presumption of truth.

7. **46 U.S.C. 41104(11).** Respondents assume that the second reference to 46 U S C. 41104(10) was intended to be 41104(11), as the text mimics the language of that provision. Any such claim is completely frivolous, as the Complaint does not identify any noncompliant NVOCC for which EUL, itself an NVOCC, transported cargo, much less knowingly and willfully

8. **46 U.S.C. 41106(2) & (3).** These sub-sections are included within a section of the Act labeled "Marine Terminal Operators," and which begins with the words "A marine terminal operator may not." The Complain nowhere alleges that EUL is an MTO, and it should be evident that EUL is, as Complainants allege, an NVOCC, not an MTO

## 4 The Commission Lacks Subject Matter Jurisdiction Over The Complaint[6]

In order to issue a default judgment, or indeed any judgment on the merits, the FMC must have subject matter over the Complaint. "[S]ubject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh v Y & H Corp*, 546 U S 500, 514 (2006) (internal citations omitted). Indeed, "[i]t is well settled that a federal court must dismiss a case for lack of subject matter jurisdiction even should the parties fail to raise the issue. *Mansfield, Coldwater & Lake Michigan Ry V Swan*111 U S 379, 382 (1884); *Williams v Life Savings and Loan*, 802 F.2d 1200, 1202 (Tenth Cir 1986)

The FMC is a tribunal of specific and limited jurisdiction. It is not a roving commission to address all ills, even if somehow related to jurisdictional entities. See, e.g., *International Ass'n of NVOCCs v Atlantic Container Line*, 25 SRR 734, 743 (FMC 1990) ("The Commission 'is not a court, and cannot rely on the powers of court of equity On the contrary, the law is settled that an administrative agency can exercise only those powers conferred upon it by Congress.'" (quoting in part from *TransPacific Freight Conference of Japan v FMB*, 302 F.2d 875, 880 (D C Cir 1962) (ellipses in original) [7] In order to issue a judgment on the merits, the FMC must first establish that it has subject matter over the Complaint. "[S]ubject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh v Y & H Corp*, 546 U S 500, 514 (2006) (internal citations omitted) Indeed, "[i]t is well settled that a federal court must dismiss a case for lack of subject matter jurisdiction even

[6] The undersigned understands that the Presiding Officer believes this to be a matter of making out a claim, rather than subject matter jurisdiction. Although Respondents take a different position, as explained herein, these same facts and arguments may also be considered in support of the previous Section 3

[7] Complainants have previously suggested that the Commission may rely on its non-statutory "Mission Statement" to override the actual language of the Act. That would be, as the FMC said in *IANVOCC*, an "extraordinary proposal."

should the parties fail to raise the issue. *Mansfield, Coldwater & Lake Michigan Ry V Swan*111 U S 379, 382 (1884), *Williams v Life Savings and Loan*, 802 F.2d 1200, 1202 (Tenth Cir 1986)

Once subject matter jurisdiction is questioned, Complainants have the burden of proof to demonstrate by a preponderance of the evidence that the FMC has subject matter jurisdiction. *Kokkonen v Guardian Life Ins. Co* 511 U S 375, 377 (1994); *Chandler v State Farm Mutual Auto Insurance Co* , 598 F.3d 1115, 1122 (9th Cir 2010) A challenge to subject matter jurisdiction is brought under Rule 12 (b)(1) of the Federal Rules of Civil Procedure, and thus may be either facial – based on the allegations in the Complaint and attachments – or factual – based on additional information submitted by the parties. As the Presiding Officer has identified.

> "With regard to motions to dismiss a complaint for lack of subject matter under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. A factual attack challenges 'the existence of subject matter jurisdiction in fact, irrespective of pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.' .In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction." *Edaf Antilles*, supra, 33 SRR at 716

The FMC has jurisdiction only over specified types of entities. The Complaint asserts only one of these types – that EUL, as a licensed NVOCC, is a common carrier It does not (and could not) allege that EUL or Mr Hitrinov is a Marine Terminal Operator, although, as previously addressed, it asserts violations applicable only to MTOs,[8] and it does not allege that EUL or Mr Hitrinov is an ocean transportation intermediary apart from EUL's status as a

[8] The Complaint likewise asserts that Respondents violated provisions applicable only to "controlled carriers."

common carrier Thus, the only issue is whether the FMC has jurisdiction over this dispute between strangers simply by virtue of EUL being a common carrier

EUL freely acknowledges that it is a licensed NVOCC, and thus a common carrier But this does not mean that the FMC has jurisdiction over every claim against EUL. Nor is it sufficient that the Complaint is clothed in the language of Shipping Act violations. As the Commission and courts have repeatedly explained, the FMC has jurisdiction only where the complainant is a protected entity under the Shipping Act and the respondent has acted as a regulated entity vis-à-vis the particular complainants for the particular shipment.

In *Sea-Land Dominica, S.A. v Sea-Land Service, Inc.*, 26 SRR 578 (FMC 1992), for example, the Commission held that it lacked jurisdiction over a complaint, similar in certain respects to the instant Complaint, asserting violations of Section 10(d)(1) for alleged unreasonable practices and procedures by an entity (Sea-Land Service-Inc. that was admittedly and obviously a regulated ocean common carrier The Commission explained.

> "There is nothing in the specific language, structure, or legislative history of the 1984 Act which shows an intention to subject the dispute between Complainants and Sea-Land to our jurisdiction. The "any" person language in Section 11 of the 1984 Act relates only to who may bring an action. It is procedural in nature and does not give the Commission any jurisdiction over a particular subject matter Such jurisdiction must be found in the substantive provisions of that statute." Id. at 581 (footnote omitted).

The Commission there determined that its jurisdiction was limited to actions among regulated entities or, for claims against carriers, members of the shipping public (i.e., shippers), and accordingly dismissed with prejudice for lack of subject matter jurisdiction. In so doing, the Commission relied in part on a similar holding under the Interstate Commerce Act that claims against carriers for discrimination could be brought only by "shippers or those who act as shippers in particular transactions.

The Commission's holding in *Sea-Land Dominica* is entirely consistent with past precedent under the 1916 Act. In *Cargill v Waterman SS Corp*, 21 SRR 287 (FMC 1981), the Commission stated.

> "Although Cargill is a "person" and therefore included in the literal language of Section 16 First, the Presiding Officer recognized that the statute was not intended to subject ocean carriers for all economic injuries factually connected to their ratemaking practices. Liability must end at some sensible, reasonably foreseeable point. In cases arising under former Section 3 of the Interstate Commerce Act, only persons which otherwise deal directly with common carriers in their capacity as such have been entitled to protection." Id. at 300 (citations omitted) [9]

Complainants do not, and cannot, allege that they had any type of shipper-carrier relationship with Empire. While the Complaint is artfully phrased to suggest that Complainants might have been shippers, what they really say is that the Kapustin Global Auto Group arranged and paid for the transportation. And Complainants themselves admit that they were never issued any bills of lading, dock receipts, or other shipping documents, as that very assertion underlies one of their points of contention.

In short, Complainants were not transportation customers of Empire, but rather, simple purchasers of goods from the Kapustin Global Automotive Group If anyone has a conceivable Shipping Act claim against Empire it is the Group [10] And if Complainants have any type of claim against anyone, it is against the Group, which failed to deliver the goods as promised, and which has already been found by the New Jersey judge to have engaged in fraudulent activities concerning delivery of the cars.

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[9] Although the Commission there found complainant within the protection of the Act, it did so only because complainant was the functional equivalent of a shipper under the "unusual, and possibly unique grain purchasing system" being employed. Id. at 300-01

[10] Complainants do not assert that they have an assignment of the Group's putative claims against Empire, and such an assignment would conflict with that ratified by the federal court in New Jersey

## CONCLUSION

For the foregoing reasons, Respondents respectfully request the Presiding Officer to deny the request for a default judgment.

Respectfully submitted,

Eric Jeffrey
Harini N Kidambi
**Nixon Peabody LLP**
799 9th Street, N W., Suite 500
Washington, D C. 20001
202-585-8000

EXHIBIT


# WHO INC.

*Architectural Windows & Doors*

2301 Coney Island Avenue
Brooklyn, N.Y. 11223
TEL. (718) 376-9100
FAX. (718) 376-0090


April 20 , 2016

**RE: Miss delivered Mail**

**To whom it may Concern**

By mistake two yellow envelopes, addressed to Empire United and Michael Khitrinov , were delivered to our office at some time in January , 2016. It looked like the samples we are usually receiving from the factory Those 2 envelopes were sitting unopened in the samples box until the mid of April, 2016.

In about April 10 our neighbor Michael came to our office asking to locate some mail. And then how we discovered the envelopes. We apologize for the misplacing our neighbors mail.

Unfortunately it happened for the last 10 years when we receive mail for Empire United and Empire United is receiving mail for us. We all tried to fix is with the US mail local office but this is the way they are. It is not really out fault

Please feel free to contact us for verification purposes.

Michael Verstandig

Michael Verstandig